FILED

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

LARRY DALE HATLEY,

v.

JANET DICKERSON MCCARTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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7288

QUESTION PRESENTED

QUESTION 1

MAY A STATE TERMINATE A PARENT'S PARENTAL RIGHTS IN A MINOR CHILD FOR CONDUCT PROTECTED BY THE FIRST AMENDMENT?

QUESTION 2

MAY A STATE, CONSISTENT WITH DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT, TERMINATE A PARENT'S PARENTAL RIGHTS IN A MINOR CHILD WITHOUT A SPECIFIC FINDING OF GROUNDS AS REQUIRED BY STATUTE THAT WOULD CONSTITUTE PARENTAL UNFITNESS?

QUESTION 3

UNDER THIS COURT'S RULING IN SANTOWSKY, IF A STATE TERMINATES PARENTAL RIGHTS IN A MINOR CHILD WITHOUT A SPECIFIC FINDING OF GROUNDS FOR TERMINATION AS REQUIRED BY STATUTE, DOES THAT VIOLATE THE PARENT/CHILD'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT?

QUESTION 4

SINCE TERMINATION PROCEEDINGS ARE QUASI-CRIMINAL, MAY ANY PORTION OF THE BURDEN OF PROOF BE SHIFTED TO A PARENT WHOSE PARENTAL RIGHTS ARE BEING TERMINATED?

QUESTION 5

IS A PARENT FACING TERMINATION OF HIS PARENTAL RIGHTS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL?

PARTIES TO THE PROCEEDINGS

LARRY DALE HATLEY - *Petitioner*

JANET DICKERSON MCCARTER - *Respondent*

LAUREN ELIZABETH HATLEY - The Minor Child

LEE CLEMENS - *Guardian Ad Litem* for the Minor Child

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OTHERS

TO THE HONORABLE CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Larry Dale Hatley, files this Petition for Writ of Certiorari to review the Judgment of the Supreme Court of Texas which refused to review the Judgment of the Court of Appeals affirming the Trial Court's Judgment terminating Petitioner's parental rights.

OPINIONS BELOW

Copies of the Order of the Supreme Court of Texas denying Petitioner's Motion for Rehearing and the Order denying Petitioner's Petition for Review are attached hereto as Appendices A and B. The order of the Dallas Court of Appeals, denying Petitioner's Motion for Rehearing, is attached hereto as Appendix C, and the Opinion of the Dallas Court of Appeals is attached as Appendix D. The judgment terminating Petitioners parental rights by the 330th District of Dallas County, Texas is attached as Appendix E.

JURISDICTION

This is a civil appeal from the highest court of a state. Petitioner's Motion for Rehearing of the denial of the Petition for Review was denied by the Supreme Court of Texas on September 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(1).

STATUTES INVOLVED

This Petition involves the First, Fifth, Sixth, Ninth and the Fourteenth Amendments to the United States Constitution.

This case also involves the statutory requirements of Texas Family Code §§ 161.001 and 161.206 as to the findings required in a final judgment of termination.

SUMMARY OF THE ARGUMENT

This case involves the substantive due process requirements that specific factual findings be stated as grounds sufficient to support termination, both in the jury charge and in the judgment terminating Petitioner's rights. The failure of the Court to make specific findings as required by law, and then to terminate the parental rights to his minor daughter does violence to the due process requirements under the Fourteenth Amendment.

SUMMARY OF THE CASE

This termination of parental rights case arises from a post-divorce conservatorship contest. In the trial court, Hatley sought conservatorship of the minor and McCarter countered with a suit for termination. The trial ended on December 6, 1996, when ten jurors answered "yes" to a question that submitted grounds for termination in the disjunctive.[1] Further, the question to the jury impermissibly combined two different legal standards; *i.e.*, endangerment and parental unfitness.

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[1] The jury was asked whether Petitioner:

(1) knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child; or

(2) engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child.

Judge Burdock, who tried the case, resigned from the bench after the verdict was returned but before any judgment was signed. Judge Spurlock was then appointed to the case. Thereafter, on August 5, 1997, Judge Spurlock signed a Decree Terminating the Parent-Child Relationship between Petitioner and his daughter, Lauren Elizabeth Hatley, in Cause No. 94-18870-Y in the 330th Judicial District Court of Dallas County, Texas. The Decree is statutorily and constitutionally defective because the required findings of conduct (grounds) constituting parental unfitness or neglect are in the disjunctive and are therefore no findings at all.[2] In this connection findings Nos. 1 and 2, each made in the alternative, are not positive findings that either one of the alternatives occurred. The finding that the petitioner knowingly placed the children with persons who engaged in conduct which endangers the physical and emotional well-being of the children is not a finding that the petitioner engaged in conduct or knowingly placed the child with persons who engaged in such conduct, nor is it a finding that both alternatives occurred.

---

[2] "The Court finds by clear and convincing evidence that LARRY HATLEY has:

(1) knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child; or

(2) engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child.(Appendix E)

The Court also finds by clear and convincing evidence that termination of the parent-child relationship between LARRY HATLEY and LAUREN ELIZABETH HATLEY is in the best interest of the child." (Appendix E)

Judge Spurlock never reviewed the record of the trial to determine the sufficiency of the evidence before entering judgment, although required by statute. The Dallas Court of Appeals held that Petitioner had the burden of bringing the record before Judge Spurlock so that he might review it before signing the judgment. The Texas Supreme Court did not disturb this conclusion.

STATEMENT OF THE CASE

QUESTION 1

MAY A STATE TERMINATE A PARENT'S PARENTAL RIGHTS IN A MINOR CHILD FOR CONDUCT PROTECTED BY THE FIRST AMENDMENT?

It is clear from the Honorable Court of Appeals opinion that Petitioner's parental rights were terminated because he persisted in making allegations that his daughter was the victim of sexual abuse. The grounds stated to support termination by the Court of Appeals under the clear and convincing evidence standard do not pass constitutional muster. Rather the conduct cited is more in the form simple neglect. The Court of Appeals concluded:

> "The burden of proof required to terminate a parent's rights is clear and convincing evidence. See Tex.Fam.Code Ann. s 161.001 (Vernon Supp. 1998). "Clear and convincing evidence" means the measure of degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Tex.Fam.Code Ann.s 101.007 (Vernon 1996). Even with this standard, however, and considering only the evidence and inferences, viewed in their most

favorable light, that support the jury's finding, and disregarding all evidence and inferences to the contrary, we conclude that the evidence is legally sufficient to show that Hatley engaged in conduct that endangered the physical or emotional well-being of the child. **He pressed the charges of sexual abuse against appellee and her mother to anyone who would listen. At one time he accused appellee's father and husband of committing sexual abuse.** He confided in a friend that asserting the charges of sexual abuse might get him greater custodial rights. He had three pelvic examinations performed on Lauren, the first when she was still an infant and the third after Judge Lewis had expressly admonished him not to have another such examination done. To do the examinations, he selected two doctors with whom he had extended relationships, one who treated him for sports injuries and another who consulted with him on personal injury cases. Neither doctor was a pediatrician or gynecologist. Even so, neither doctor supported his claim of sexual abuse. There was evidence that he did not provide Lauren with medical attention when it was required. There was also evidence that Lauren developed a great anxiety that Hatley would keep her away from her mother. There was evidence that Hatley pinched her or held her tightly enough to cause bruises, and that he did so at least once because he overheard Lauren tell her mother over the phone that she loved her. Lauren knew that photographs taken of her when she was visiting with Hatley might be used in court against her mother. Lauren also knew that Hatley had hired private investigators to follow her around in her daily routine, on at least one occasion. We conclude that the evidence was legally sufficient, under a clear and

convincing standard, to support the jury's verdict." (Appendix)(Emphasis supplied)

It is a crime in Texas to not report child abuse. Reporting a suspected crime is a protected First Amendment right. Petitioner's comments regarding suspected abuse and having the child examined by physicians is an exercise of protected First Amendment rights. *Andrews v. Ballard*, 498 F.Supp. 1038 (D. Tex. 1980). Petitioner's efforts to investigate suspected sexual abuse of his daughter is an exercise of his First Amendment right to petition for the redress of grievances and for access to the courts. *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 28 S.Ct. 34, 25 (1907); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 94 S.Ct. 609, 611 (1974).

The exercise of constitutionally protected First Amendment rights cannot constitute "clear and convincing evidence" of parental neglect or endangerment. Nor are the other reasons stated by the Court of Appeals clear and convincing evidence of grounds sufficient for termination. Absent clear and convincing evidence of grounds to terminate Petitioner's parental rights the judgments of the Texas courts must be reversed.

QUESTION 2

MAY A STATE, CONSISTENT WITH DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT, TERMINATE A PARENT'S PARENTAL RIGHTS IN A MINOR CHILD WITHOUT A SPECIFIC FINDING OF GROUNDS AS REQUIRED BY STATUTE THAT WOULD CONSTITUTE PARENTAL UNFITNESS?

QUESTION 3

UNDER THIS COURT'S RULING IN SANTOWSKY, IF A STATE TERMINATES PARENTAL RIGHTS IN A MINOR CHILD WITHOUT A SPECIFIC FINDING OF GROUNDS FOR TERMINATION AS REQUIRED BY STATUTE, DOES THAT VIOLATE THE PARENT/CHILD'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT?

The parent-child relationship was terminated by the State of Texas over the objections of both the parent and the child's guardian ad litem. Petitioner's parent-child relationship with his daughter is a fundamental liberty interest protected by the Fourteenth Amendment. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of social services of Durham County*. 452 U.S. 18 (1981). The integrity of the family unit has found protection in the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Ninth Amendment. *Stanley v. Illinois*, 405 U.S. 645 (1972). Since his relationship with his daughter is a fundamental liberty interest protected by the Fourteenth Amendment, Petitioner stands to lose his substantial rights because, like a "death penalty" criminal case, the termination of parental rights is irrevocable and final. *M.L.B. v. S.L.J.*, 519 u.s. 102 (1996). This Honorable Supreme Court has held that the parent-child relationship is protected as a matter of substantive due process. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). "At the fact finding, the state cannot presume that a child and his parents are adversaries... Until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the fact finding, the interests of the child and his natural parents coincide to favor use of *error-reducing*

procedures." *Santosky*, 455 U.S. at p. 760 (emphasis supplied).

This authority requires this Honorable Court to give heightened scrutiny to the procedure employed to terminate Petitioner's parental rights. The question the jury was asked was a "broad form" question, which allowed the jury to find for termination without any ten jurors all agreeing that Petitioner had, in fact, committed any one act that would warrant termination.[3] The Decree terminating Petitioner's parent-child relationship with his daughter is constitutionally repugnant because its findings are in the disjunctive and are therefore no findings at all.[4] Without a specific finding of conduct that would warrant termination, the judgment violates the requirements of *Texas Family Code* §§ 161.001 and 161.206 and Petitioner's Due Process and Equal Protection rights under the Fourteenth Amendment of the United States Constitution.

The Texas statutory scheme for termination of parental rights, § 161.001 and § 161.206(a), Family Code (Appendix

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[3] The jury charge impermissibly combined two different legal standards: *i.e.*, endangerment and parental unfitness.

[4] "In this connection we note that findings Nos. 1 and 2, each made in the alternative, are not positive findings that either one of the alternatives occurred. For example, the finding that the parents engaged in conduct or knowingly placed the children with persons who engaged in conduct which endangers the physical and emotional well-being of the children is not a finding that the parents engaged in conduct which endangered the children, nor is it a finding that they knowingly placed the child with persons who engaged in such conduct, nor is it a finding that both alternatives occurred." *In the Interest of S.H.*, 548 S.W.2d 804, 806 (Tex.Civ.App.- Amarillo 1977, no writ).

F) requires the court to find by clear and convincing evidence specific grounds for termination. This statutory scheme is constitutionally sound; however, the courts in Texas, guided by the Supreme Court of Texas's decision in *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647 (Tex. 1990), have reverted to termination of parental rights without specific findings of parental unfitness or neglect. The Dallas Court of Appeals specifically relied on the authority of *E.B.* to justify submission of a broad form question to the jury and to affirm the decree of termination, even though both violated the statutory mandate of specific findings and even though both are contrary to this Honorable Court's decisions in *Santosky v. Kramer*, 455 U.S. 745 (1982) and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Petitioner's Due Process and Equal Protection rights under the Fourteenth Amendment were thereby violated because of the failure of the trial court to make the necessary specific findings, while terminating Petitioner's parental rights. *Santosky v. Kramer*, 455 U.S. 745 (1982).

In *Richardson v. Green*, 677 S.W.2d 497 (Tex. 1984), the Supreme Court of Texas required specific findings for termination of parental rights. *Texas Department of Human Services v. E.B.*, 802 S.W.2d 647 (Tex. 1990) did not overrule *Richardson*, *supra*; therefore *Richardson* remains good law in Texas. Although they were cited to *Richardson* and to *Santosky*, the Honorable Supreme Court of Texas and the Honorable Dallas Court of Appeals did not follow *Richardson*, *supra*, and conclude that since the trial court's findings are disjunctive, no specific finding of conduct justifying termination was made by the trial court. Instead, they followed *E.B.*, *supra*, and impermissibly and unconstitutionally affirmed termination of Petitioner's parental rights without any specific findings of parental unfitness or neglect.

In **M.L.B. V. S.L.J.**, 519 U.S. 102 (1996), this Honorable Court addressed the issue of the specific findings required in a judgment of termination. While this Honorable Court did not decide *M.L.B.*, on the lack of specific findings, the significance of that issue cannot be overlooked in light of the importance of the right Petitioner is being deprived of.

QUESTION 4

SINCE TERMINATION PROCEEDINGS ARE QUASI-CRIMINAL, MAY ANY PORTION OF THE BURDEN OF PROOF BE SHIFTED TO A PARENT WHOSE PARENTAL RIGHTS ARE BEING TERMINATED?

Courts have consistently held that a termination case is the civil equivalent of the death penalty, as there is no greater penalty that the state can exact upon a parent in a civil context than that of terminating a parent's rights in his child. *M.L.B. v. S.L.J.*, *supra*; *Wiley v. Spratlan*, 543 S.W.2d 349 (Tex. 1986). In *M.L.B.*, *supra*, this Honorable Supreme Court held that termination is a quasi-criminal proceeding. The burden of proof in a criminal proceeding is clearly and always upon the State. There is no requirement that a Defendant take any action if the State fails to meet its burden in a criminal matter - indeed the Defendant can take advantage of any procedural error committed by the State that deprive him of a fair trial. In this termination proceeding, Respondent occupied a position analogous to that of the State in a criminal case and Respondent therefore carried the burden that must include all matters, up to and including the entry of judgment.

The Honorable Supreme Court of Texas, in *Gunn v. Cavanaugh*, 391 S.W.2d 723 (Tex. 1965), forbade the shifting of the burden of proof to the parent whose rights are

terminated. This holding is consistent with this Honorable Court's holdings in *Santosky v. Kramer*, 455 U.S. 745 (1982) and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Until parental unfitness is proven by clear and convincing evidence, the child and Petitioner share a vital interest in preventing erroneous termination of their natural relationship. *Santosky*, at p. 760.

The burden of proof for termination of the parent-child relationship was upon the Respondent McCarter. In this case, Judge Burdock heard the evidence and after the jury returned its verdict, resigned from the bench. Judge Spurlock was thereafter appointed to the case and signed the judgment without reviewing the record of the trial. The Texas Family Code, §§ 161.001 and § 161.206, require the trial court to review the sufficiency of the evidence to terminate Petitioner's parental rights.[5] Petitioner was denied due process of law by the trial court's failure to conduct the statutorily mandated review of the sufficiency of the evidence before his parental rights were terminated. Judge Spurlock did not review the record before entering judgment because the trial transcript was not in existence until after this appeal was perfected. Judge Spurlock should not be permitted to "assume" facts sufficient to sign a judgment terminating substantial rights

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[5] § 161.001. Involuntary Termination of Parent-Child Relationship.

> The court may order termination in a parent-child relationship if the court finds by clear and convincing evidence...
>
> § 161.206. Order Terminating Parental Right.
>
> If the court finds grounds for termination of the parent-child relationship by clear and convincing evidence, it shall render an order terminating the parent-child relationship. (Emphasis added)

without having personal knowledge of the evidence adduced and the credibility of the witnesses. Judge Spurlock, the Dallas Court of Appeals and the Honorable Supreme Court of texas improperly held Petitioner to the burden of producing the court reporter's record so that Judge Spurlock could review of the sufficiency of the evidence to support termination. This effectively shifted the burden to Petitioner of adducing evidence that did not support termination.[6] The decision of the Court of Appeals violates Petitioner's Due Process and Equal Protection rights under the Fourteenth Amendments.

QUESTION 5

IS A PARENT FACING TERMINATION OF HIS PARENTAL RIGHTS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL?

The termination of Petitioner's parental rights is the civil equivalent of the death penalty, for there is no greater punishment that the State can inflict in a civil case. *M.L.B. V. S.L.J.*, *supra*; *Wiley v. Spratlan*, 543 S.W.2d 349 (Tex 1986). While technically a civil case, termination cases are quasi-criminal. *M.L.B.*, *supra*. This Honorable Court has held that parents are entitled to the appointment of counsel in termination cases, due to the rights involved in the proceedings. *M.L.B.*, *supra*. If this was a contempt proceeding, which, by its very nature involves punishment far less severe than that with which Petitioner is faced herein,

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[6] Under *Gunn v. Cavanaugh*, 391 S.W.2d 723 (Tex. 1965), Petitioner had no burden to present evidence showing that termination was not justified. Respondent had the burden of showing by clear and convincing evidence that termination was justified. Respondent did not meet this burden.

there is no doubt that Petitioner would be entitled to have effective counsel appointed for him if he was unable to afford counsel under the Fifth, Sixth and Fourteenth Amendments. *See. e.g., Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985), *cert. denied* 474 U.S. 1061; *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984); *Ridgway v. Baker*, 720 F.2d 1409 (5th Cir. 1983); *Nordgren v. Mitchell*, 716 F.2d 1335 (10th Cir. 1983); *United States v. Anderson*, 553 F.2d 1154 (8th Cir. 1977); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973).

Even in a civil case, there is a Fifth Amendment right to counsel. *Potashnick v. Port City Construction Co., Inc.*, 609 F.2d 1101, 1117 -18 (5th Cir. 1980_. This Honorable Supreme Court has indicated in its criminal decisions that the right to retain counsel in civil litigation is implicit in the concept of Fifth Amendment due process. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 69 (1932); *Cooke v. United States*, 267 U.S. 517, 537 (1925).

With the magnitude of the rights of which Petitioner is being deprived, it violates common sense to hold that Petitioner is entitled to the appointment of counsel before his rights may be terminated, without requiring that Petitioner's counsel provide effective assistance of counsel under standards of the Fifth, Sixth and Fourteenth Amendments.

Petitioner was denied effective assistance of counsel in many ways. First, because his attorney did not understand that both this Honorable Supreme Court and the Honorable Supreme Court of Texas had ruled expert testimony that has no scientific basis is incompetent and should not be presented to the jury. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *E. I. DuPont de Nemours and Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). Applying this standard, psychiatrists, psychologists and caseworkers are

incompetent to give expert opinion testimony on whether termination of the parent child relationship is in the best interest of the child. Under *Daubert*, the psychological testimony that Petitioner's counsel allowed in, without objection, was incompetent and should have been excluded on proper objection. Petitioner's counsel failed to provide effective assistance in this instance.

The Court of Appeals excerpted portions of Respondent's "paid experts" testimony in an effort to support its conclusion that the evidence adduced at trial was sufficient to support termination of the parent-child relationship. These "experts" should have been precluded from testifying at trial under *Daubert*, *supra* and *Robinson*, *supra* because they were and are legally incompetent to give the opinions that they gave. Incompetent evidence, even when submitted without objection, has no probative force and will not support a judgment. *Aetna Insurance Company v. Klein*, 160 Tex. 61, 325 S.W.2d 376 (1959). Therefore, there was no competent evidence to support the termination of Petitioner's rights. However, Petitioner's counsel failed to recognize this and the psychological evidence came in without objection.

Secondly, counsel was ineffective because he waived significant error. As shown by the Court of Appeals opinion, counsel waived objections to venue, the jury charge, and incurable jury argument. The waiver of substantive legal rights in a termination proceeding is ineffective assistance of counsel.

Thirdly, counsel waived objections to the admissibility of legally irrelevant evidence of incidents that occurred before the child was born, and before the entry of the decree of divorce between these parties. The incidents cited by the Court of Appeals included the alleged rapes of McCarter

before the child was born. Evidence of events that occurred before the divorce between the parties was clearly inadmissable since it was barred by *res judicata* and *collateral estoppel*. *Slaton v. Brazoria County Protective Services* 804 S.W.2d 550 (Tex. App.-Texarkana 1991, no writ).

If this really was a quasi-criminal proceeding, then Petitioner should have the right to effective assistance of counsel under the Fifth, Sixth and Fourteenth Amendments to the U.S. constitution; *Strickland v. Washington*, 466 U.S. 668 (1984). Petitioner's defense counsel did not exercise the skill of a reasonably competent attorney, and as a result, there exists a "reasonable probability that but for counsel's unprofessional error, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

REASONS FOR ALLOWANCE OF THE WRIT

1. Petitioner's Due Process and Equal Protection Rights under the Fourteenth Amendment guarantee that there must be a specific finding of conduct constituting parental unfitness before his parental rights may be terminated. The importance of the rights involved require this Honorable Court to rectify this travesty of justice.

2. This case does violence to a parent's First Amendment rights when conduct that is protected by state and federal constitutions is the stated grounds relied upon by the state courts to terminate parental rights.

3. The Courts hereunder impermissibly imposed the burden of proving why Petitioner's rights should not be terminated on Petitioner, instead of keeping the burden of proving grounds for termination by clear and convincing evidence upon Respondent, in violation of this Honorable

Court's holdings in *Santosky* and in *M.L.B.*, *supra*, and in violation of Petitioner's Due Process and Equal Protection Rights under the Fourteenth Amendment.

4. If termination of parental rights really is the civil equivalent to the death penalty, then Petitioner should be entitled to the effective assistance of counsel under the Fifth and Sixth amendments to the United States Constitution.

5. It violates a parent/child's Due Process and Equal Protection rights under the Fourteenth Amendments for their parent-child relationship to be terminated over mutual objection without a specific finding of parental unfitness.

6. It violates a parent's Due Process and Equal Protection rights under the Fourteenth Amendment by shifting the burden of showing why his parental rights should not be terminated to the parent.

CONCLUSION

For all of the reasons stated herein, this Honorable Court should grant this Petition for Certiorari.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF TEXAS
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September 02, 1999

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RE: Case Number 99-0323
Court of Appeals Number: 05-97-01903-CV
Trial Court Number: 94-18870-Y

Style: LARRY DALE HATLEY
v.
JANET DICKERSON MCCARTER

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Sincerely,
John T. Adams, Clerk

by /s/ Tanya R. Hunter
Tanya R. Hunter, Deputy Clerk

cc: Ms. Lisa Rombok, Clerk
Mr. Jim Hamlin

APPENDIX B

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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July 01, 1999

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RE: Case Number 99-0323
Court of Appeals Number: 05-97-01903-CV
Trial Court Number: 94-18870-Y

Style: LARRY DALE HATLEY
v.
JANET DICKERSON MCCARTER

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya R. Hunter
Tanya R. Hunter, Deputy Clerk

cc: Ms Lisa Rombok, Clerk
Mr. Jim Hamlin

APPENDIX C

Order issued February 23, 1999

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-97-01903-CV

LARRY DALE HATLEY, Appellant

V.

JANET DICKERSON MCCARTER, Appellee

ORDER

Before Justices Lagarde, Kinkeade, and Wright

Appellant's Motion for Rehearing filed January 11, 1999 is **DENIED**.

/s/ Sue Lagarde
SUE LAGARDE
JUSTICE

APPENDIX D

AFFIRMED; Opinion Filed December 16, 1998

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-97-01903-CV

LARRY DALE HATLEY, Appellant
V.
JANET DICKERSON McCARTER, Appellee

On Appeal from the 330th District Court
Dallas County, Texas
Trial Court Cause No. 94-18870-Y

OPINION

Before Justices Lagarde, Kinkeade, and Wright
Opinion by Justice Lagarde

Appellant Larry Dale Hatley appeals the trial court's judgment, based upon a jury's verdict, terminating his parental rights to his minor daughter. He argues that: (1) the judgment is fatally defective; (2) the evidence is legally and factually insufficient to support termination and the trial court did not sufficiently review the evidence; (3) the trial court erred in not transferring venue to McLennan County; (4) the trial court erred in improperly instructing the jury on the law and in making an impermissible comment on the weight of the evidence; (5) the trial court erred in failing to grant a new trial because of incurable jury argument; and (6)

appellee Janet Dickerson McCarter deprived Hatley of a fair trial by constant references to improper matters. We resolve all of Hatley's issues against him and affirm the trial court's judgment.

Hatley's first issue raises the question whether the decree of termination is void because its findings are in the disjunctive. He quotes the findings in the decree:

> The Court finds by clear and convincing evidence that **LARRY HATLEY** has:
>
> (1) knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child; or
>
> (2) engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child.
>
> The Court also finds by clear and convincing evidence that termination of the parent-child relationship between **LARRY HATLEY** and **LAUREN ELIZABETH HATLEY** is in the best interest of the child.

Hatley argues that, because the findings are in the disjunctive, he does not know whether the jury found that he knowingly placed the child in endangering conditions or surroundings or knowingly engaged in conduct endangering the child. He concludes that the decree is void as a result.

See In the Interest of S___ H___, 548 S.W.2d 804, 806 (Tex. Civ. App.--Amarillo 1977, no writ).[1]

S__ H__, however, has been effectively, if not expressly, overruled. A court of appeals held that the jury charge in a termination case must contain discrete questions, because otherwise five jurors could have concluded that an appellant placed a child in a dangerous situation and the other five could have concluded that the appellant engaged in dangerous conduct. *See E.B. v. Texas Dept. of Human Servs.*. 766 S.W.2d 387, 388-90 (Tex. App.--Austin 1989), *rev'd, Texas Dept. of Human Servs. v. E.B.*,802 S.W.2d 647, 649 (Tex. 1990) (op. on mot. for reh'g). In reversing the court of appeals, the Texas Supreme Court concluded that broad form submissions were proper in termination cases and approved of the trial court's submitting a single question (for each of two children): "Should the parent-child relationship between [the parent] and the child ... be terminated?" *E.B.* 802 S.W.2d at 648-49. Yet if it is permissible for a jury to answer only the ultimate issue, whether the parent-child relationship should be terminated, it is difficult to see why disjunctive findings supporting the ultimate finding are harmful.

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[1] The S__ H__ Court did reverse the judgment and remand the case for retrial. This Court, however, took issue with S__ H__ and held that reversal was not necessary; all that was required was to abate the appeal for less than a month to direct the trial court to make sufficiently specific findings. *See Juan A__ v. Dallas County Child Welfare*, 733 S.W.2d 559, 560 (Tex. App.--Dallas 1986, no writ). In his original brief, Hatley did not mention *Juan A__* in any way, although it was authority out of this Court adverse to his position. After we questioned him about *Juan A__* during oral argument, he filed (without leave) a postsubmission brief. That brief mentions *Juan A__*, but only to argue that it supports Hatley's position that a decree of termination must make specific findings. He completely ignores the fact that the result of *Juan A__*. was entirely different from the result in *S__ H__*.

Hatley argues that *E.B.* is "erroneously decided and not binding upon this Court." We disagree. The courts of appeals, as intermediate courts, must follow supreme court decisions on controlling law until the supreme court changes the law. *Nat'l Convenience Stores, Inc., v. T.T. Barge Cleaning Col*, 883 S.W.2d 684, 687 (Tex. App.--Dallas 1994, writ denied).

Further, the very argument made in Hatley's first issue was presented to this Court in a mandamus proceeding, styled *In re Larry Dale Hatley*, cause no. 05-97-02047-CV. On December 1, 1997, this Court denied Hatley relief. Hatley then filed a mandamus proceeding with the Texas Supreme Court, styled *In re Larry Dale Hatley*, cause no. 97-1136. On January 8, 1998, the Texas Supreme Court denied relief.[2] *See* Miscellaneous Orders, 41 Tex. Sup. Ct. J. 240. Hatley argues that we should attach no significance to the supreme court's summary denial. He cites authority for the proposition that, if an appellate court issues no opinion in a case, no law of the case is established. *See Hansen v. Academy Corp.*, 961 S.W.2d 329, 333 n.6 (Tex. App.-- Houston [1st Dist] 1997. pet denied). He concludes, "The denial of the [w]rits of [m]andamus without written opinions only means that [appellant's [p]etitions were either procedurally defective or that he has an adequate remedy by appeal."

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[2] Hatley did not provide us with a courtesy copy of the petition for writ of mandamus that he filed with the Supreme Court, nor did he mention that proceeding, or its result, in his original brief. Only after McCarter informed this Court of the Supreme Court proceeding in her brief did Hatley address the effect of the Supreme Court's summary denial in his reply brief. Hatley's counsel was under an obligation to furnish this Court with all facts relevant to this appeal, particularly the fact that Hatley had sought the same relief in the Texas Supreme Court and that court had summarily denied relief. *See Lowe v. Hollern*, 784 S.W.2d 737, 739 (Tex. App.--Dallas 1990, orig. proceeding).

Again, we cannot agree. In *Hansen*, the First Court of Appeals remanded a case to the trial court. It overruled a motion for rehearing without an opinion. On appeal after remand, the appellant argued that the trial court erred in not considering an issue that had been raised in the overruled motion for rehearing. The appellee argued in response that the trial court could not consider the issue because the overruling of the motion for rehearing was now the law of the case. The court of appeals agreed with the appellant. *Hansen*, 961 S.W.2d at 330-33. *Hansen* is procedurally different from this case.

The First Court of Appeals knew all the details, including its own internal deliberations in overruling the motion for rehearing in the first appeal of the case. At the time that the First Court of Appeals entertained the appeal after remand, the Texas Supreme Court was in no way involved in the case. Therefore, the First Court of Appeals was entirely free to consider the legal effects of its earlier actions.

In sharp contrast, Hatley asks us to conclude that, because the supreme court did not issue an opinion in connection with his mandamus proceeding, it disposed of that proceeding without reference to the merits. We cannot presume so. The supreme court *may* have denied relief because Hatley's petition was procedurally defective, or it *may* have denied relief because Hatley had an adequate remedy on appeal. But it may also have denied relief because it considered the petition unmeritorious. The lack of an opinion does not mean that the supreme court did not consider the merits; it means only that we do not know what it did, or did not, consider.

In short, Hatley asks us to resolve his first issue by ignoring binding precedent and by completely disregarding

a ruling that the supreme court has already made in this very litigation. We decline to do so. We resolve Hatley's first issue against him.

Hatley's second issue attacks the legal and factual sufficiency of the evidence to support the termination of his parental rights. He also argues that the trial court erred in failing to review the sufficiency of the evidence. When appellee filed her first amended original petition to terminate parent-child relationship, she alleged:

> The termination of the parent-child relationship between LAUREN ELIZABETH HATLEY and the father LARRY L. [sic] HATLEY, is in the best interest of the child, and such termination is requested.
>
> As further grounds for termination, Petitioner {appellee] alleges that the circumstances of the child, parent, sole managing conservator, possessory conservator, or other party affected by the prior Order denying a petitioner [sic] for termination of the parent-child relationship of Petitioner have materially and substantially changed since the entry of the Decree of Divorce and that, prior to filing of this Petitioner to Terminate, and continuing as of this date, LARRY L. HATLEY, has engaged in conduct that endangers the physical and emotional well-being of the child.
>
> Petitioner would show that Respondent, LARRY L. HATLEY, has persisted in making baseless, false, malicious and premeditated sexual abuse allegation [sic] involving the subject child's Mother and the child's Maternal Grandparents. LARRY L. HATLEY has repeated these unfounded

and hateful allegations over a period of years since the parties' divorce and constitute [sic] a continuing course of conduct by LARRY L. HATLEY. This conduct by LARRY L. HATLEY endangered that minor child in that she has been extensively and repeatedly interrogated by unauthorized mental and health care professionals and has been submitted to unauthorized and unwarranted physical examinations in connection with the false and premeditated sexual abuse allegations manufactured by LARRY L. HATLEY.

Petitioner would further show that after relocating with her family in Waco, Texas, LARRY L. HATLEY continued to publish the unfounded sexual abuse allegations, as well as other defamatory statements, against Petitioner to the principal of the child's school.

The relationship between LARRY L. HATLEY and the minor child has, for her entire life, been antagonistic, adversarial and one which continues to endanger the emotional well-being of the child. LARRY L. HATLEY continues to engage in this harmful conduct by perpetrating this litigation. Petitioner would further show that in the eyes of the minor child, and in the words of the court-appointed psychologist, the minor child is "serving time" when she visits with Respondent. LARRY L. HATLEY has described their visits as mental abuse for both parent and child.

Petitioner would further show that Respondent's course of conduct has depleted family resources while refusing to pay attorney's fees incurred by Petitioner in defense of earlier frivolous

allegations of sexual abuse in the Family District Court of Harris County, Texas, which fees were assessed against Respondent.

Petitioner would further show that the intervention of two court-appointed psychologists has failed to sway or dissuade Respondent from his insistence that Petitioner and the child's maternal grandmother are guilty of child abuse and that the minor child is the victim of sexual abuse. Respondent has created and continues to perpetrate an environment which is injurious to the child's physical, emotional and psychological well-being and termination of the parent-child relationship is in the best interest of the subject minor child, LAUREN ELIZABETH HATLEY.

In addressing a legal sufficiency or no-evidence challenge, we must consider only the evidence and inferences, viewed in their most favorable light, that support the jury's finding, and we must disregard all evidence and inferences to the contrary. *Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 593 (Tex. 1986). If there is more than a scintilla of evidence to support the finding, then the no-evidence challenge fails. *See Stedman v. Georgetown Sav. & Loan Ass'n.*, 595 S.W.2d 486, 488 (Tex. 1979). When the evidence offered to prove a vital fact is so weak it does nothing more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *Kindred v. Con/Chem. Inc.*, 650 S.W.2d 61, 63 (Tex. 1983); *Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 755 (Tex. 1970). However, if the evidence supplies some reasonable basis for differing conclusions by reasonable minds of the existence of a vital fact, then there is some evidence. *Kindred*, 650 S.W.2d at 63.

In addressing a factual-sufficiency-of-the-evidence challenge upon a jury verdict, an appellate court must consider and weigh *all* of the evidence, not just that evidence which supports the verdict. *City of Princeton v. Abbott*, 792 S.W.2d 161, 163 (Tex. App.--Dallas 1990, writ denied); *see Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). The verdict should be set aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain*, 709 S.W.2d at 176; *Dyson v. Olin Corp.*, 692 S.W.2d 456, 457 (Tex. 1985). However, this Court is not a fact finder, and we may not pass upon the credibility of the witnesses or substitute our judgment for that of the trier of fact, even is a different answer could be reached upon review of the evidence. *Clancy v. Zale Corp.*,705 S.W.2d 820, 826 (Tex. App.--Dallas 1986, writ ref'd n.r.e.).

On September 19, 1987, Hatley and Janet Dickerson were married. They resided in Houston. On May 29, 1988, their child, Lauren, was born. The marriage had its problems. At one point in the fall of 1987, when appellee was several months pregnant, she and Hatley went to dinner. She ordered a club soda. When she went to the rest room and came back, her drink had been refilled, and it was a vodka tonic. Before she took a sip, she smelled it, and said something to Hatley. He just smiled, although he knew that appellee had a problem with drinking in the past and was a recovering alcoholic.

When appellee was at least seven months pregnant, she was ironing in the kitchen. Hatley came up to her in the middle of the day and said that he wanted to "do it". She said no. She made it through the kitchen, but he bent her over and did the act from behind. She grabbed her ankles. Once again, Hatley said nothing afterwards and simply smiled. About a week before Lauren was born, Hatley did the same thing. He did the same thing one more time when

Lauren was several weeks old but appellee had not yet healed. On none of those three occasions did appellee consent to sex. When Lauren was three months old or thereabouts, appellee took Lauren with her and left Hatley.

Appellee filed for divorce in Houston; on February 28, 1989, it was granted. Appellee was named the sole managing conservator, with Hatley having standard visitation rights. At one point, Hatley learned that appellee had rubbed Lauren's private parts with a washcloth and that Dorothy Dickerson, appellee's mother, had inserted a finger, wrapped in a washcloth, into Lauren's vagina. Dickerson was showing appellee how to wash Lauren. Hatley took Lauren for her first pelvic examination when she was six months old.

Debbie Miller moved in with Hatley in October 1994. At about the same time, Lee Clemens was appointed attorney ad litem to represent Lauren. Clemens filed a motion to increase child support to bring the support payments up to guidelines. On October 14, 1994, a Friday, Hatley filed to be named sole managing conservator. Debbie walked the papers to the courthouse. The next weekend Hatley was to have possession of Lauren.

On Saturday, October 15, Hatley had his attorneys, Pete Dadinis, Jim Skelton, and a law school friend, Thomas Roy Bray, present at his home. Lauren was also present. Bray testified that he did not know how much of their conversation Lauren understood, but any intelligent child would know that something was going on. That Sunday October 16, Hatley told Debbie that he was going to keep Lauren. Later that day, about 5:15 p.m., when Hatley had not telephoned appellee to say that Lauren was on the plane, appellee called him. He then told her that Lauren was not coming home that Sunday night. After adding, "You do

what you have to do and I'll do what I have to do," he hung up.

Debbie testified that, on the morning of Tuesday, October 18, the sexual abuse allegations were first raised. That same day she took Lauren to Camille Langham, a sports, who had treated Hatley for back injuries and neck sprains. Debbie repeatedly insisted on the stand that she did not know what Langham was going to do and could not see whether she inserted a probe into Lauren; she did know that that the procedure would hurt a little and the cream would be cold. Langham's medical records, however, make it clear that she gave Lauren another pelvic examination.

Meanwhile, appellee had remarried, to Jack McCarter, III. They were living in the Dallas area at the time and ultimately succeeded in transferring venue of the case from Houston to Dallas. On Monday, October 17, 1994, she, McCarter, and her then attorney Michael Geary went to Houston to file a petition for a writ of habeas corpus. Hatley would not allow appellee to speak to Lauren except through his attorney Pete Dadinis. When she was in Houston, she heard the allegation that Hank Dickerson, her father, was accused of sexually molesting Lauren. The next day Pete Dadinis told a Houston attorney assisting in appellee's case that it was not Hank who had molested Lauren; instead, it was Jack McCarter, appellee's new husband. On October 21, during the habeas corpus hearing, appellee heard evidence that she, herself, was now a suspect of sexual abuse allegations.

On November, Debbie filed an affidavit with the Highland Park Department of Public Safety. She swore that, early in the morning of October 18, around 2:00 a.m., Lauren came into the bedroom where Debbie and Hatley were sleeping to tell them that her privates hurt. Later that

day, when Debbie took her to Langham's office, Lauren told Langham and her that appellee would use a washrag on her finder but Dee Dee (Dorothy Dickerson, her grandmother) did not; she just used her finder. Sometimes it hurt when her mother went up too far and sometimes it did not. Detective Lowell Millican, with the Highland Park Police, investigated Debbie's complaint. He took Lauren to the Children's Advocacy Center, where she was interviewed by Jan Dozier. He watched the interview through a one-way mirror. He concluded that there was no substance to the sexual abuse allegations. He wrote Hatley a letter summarizing his findings. When he testified, he said he believed that something had happened to Lauren; specifically, that her mother and grandmother washed her vaginal area and that sometimes it hurt. He did not consider it sexual abuse, however, because there was no intent to arouse anyone's sexual gratification. He took the incident simply to be a mother;s instruction to her daughter on hygiene.

In addition to the police, Hatley raised the assertions of sexual abuse to Child Protective Services and the Children's Advocacy Center. Both agencies also investigated, and neither found any evidence of sexual abuse.

Just before Thanksgiving in 19994, appellee asked Marilea Lee Lewis, the Court master then handling the case in Dallas, not to send Lauren to Hatley for visitation when it was his time for possession. Judge Lewis made Lauren go, but admonished Hatley and Debbie not to take Lauren for any more pelvic examinations. Nonetheless, on November 25, Hatley took Lauren to Dr. Chana, a doctor who works as a consultant with Hatley in personal injury cases. Significantly, neither doctor chosen by Hatley, Dr. Langham or Dr. Chana, found evidence to support Hatley's allegations of sexual abuse.

In the meantime, Lauren was developing a great anxiety that she might never see her mother again. Dr. Donald Lammers, a psychologist appointed by the Court, tested Hatley, appellee, appellee's mother Dorothy Dickerson, Lauren, and Debbie Miller's mother, who had also made allegations in 1988 that appellee herself had been sexually abused as a child by close family members. Dr. Lammers did not find sufficient evidence to indicate that Lauren had been sexually abused. Hatley, however, did not readily accept those findings. Dr. Lammers consulted with Dr. Michael Cox, a clinical psychologist at Baylor College of Medicine in Houston. Dr. Lammers wanted to see if Dr. Cox could establish a bond between Lauren and Hatley. Dr. Cox could not discern that there had ever been a bond between the two of them. He found no indications that Lauren had been the subject of sexual abuse. He made his conclusion known to Hatley, who refused to accept it. Dr. Cox suggested to Hatley that the custody litigation was doing no one any good. He even recommended terminating Hatley's visitation rights for a time, but he learned that Judge Lewis did not approve of his recommendation. He conceded that he would have wanted to have investigated further before making a recommendation that suggested a permanent termination. He noted that Lauren did not even want her picture taken as having a good time when she was with her father, because she was afraid that the picture could be used against her mother in court. Dr. Cox finally concluded that he had no recommendations, short of termination, that would safeguard Lauren's best interest.

Hatley argued during the course of the trial that he dropped any allegation of sexual abuse against appellee and her mother, although he did not amend his pleadings to delete such allegations. One of his witnesses, however, was a law school friend named Patrick O'Neill Hardy. Hatley had told him that Lauren had told Hatley that appellee's

mother "was wiping her real hard in her private parts with a rag." This conversation occurred before the divorce was settled in 1989. Hardy's "explanation" was that Hatley "wanted full custody of the child at the time." He elaborated:

> Larry would--Larry would--This [sexual abuse was one of the things that was constantly on Larry's mind, and it was--it was the same type of incident. And any time that we would talk about it, during this period he's been going through this, he would bring that up. I don't know the exact time, but between 1989 and right now.
>
> Q Between 1989 and now, this has constantly been on his mind?
>
> A That his child might be being abused? Yes, ma'am, it has constantly been on his mind.
>
> * * *
>
> When I say "constantly on his mind." whenever I say-- whenever I would wonder about why he was going through all that he was going through and putting himself through these things, trying to get the child more custody than what he had this is what he would say.

In December 1995, appellee filed her original petition to terminate Hatley's parental rights. The petition was based in large part upon Hatley's continuing to press sexual abuse allegations that appellee characterized as unfounded. In April 1996, appellee filed her first amended original petition to terminate. This pleading, extensively quoted from earlier, was the live pleading at the time of trial. I reasserted

appellee's claims that Hatley was deliberately making false allegations of sexual abuse against appellee and her parents.

Three other incidents came to light in the litigation. In April 1994, Hatley had an automobile accident. Lauren had been riding in the front passenger seat, without a seatbelt. The force of the impact made Lauren's head hit the windshield hard enough to crack it. Nonetheless, he proceeded to take Lauren to her karate class and then to have lunch with her before he consulted a doctor.

In the spring of 1995, Lauren was visiting with Hatley and went to visit Debbie's sister's house to play with Debbie's sister's son Tory. They had a dog named Lucky. Lauren got flat on the floor and put her face against the dog's. The dog "licked" her on the nose. According to Hatley, the skin was not broken. Debbie's sister told him that the dog had been given its shots, but he did not tell appellee. Instead, he told Lauren to tell appellee that the dog was just protecting its territory.

When Lauren got off the plane to rejoin appellee after the visitation with Hatley, appellee learned that she had been bitten by a dog. She looked like she had a black eye, as if she had been hit in the nose. There was "dried blood, crusted, raised across her nose." The was a dried cut, a slash, on her upper lip. When appellee tried calling Hatley, she got Debbie, who was not willing to give her any information. She had to initiate legal action to obtain the dog's shot records and, as it turned out, the dog had not had its shots. After a ten-day quarantine, the dog was determined to be healthy. The next day, appellee took Lauren to a pediatrician, the results of his examination are not in the record.

Debbie testified that, *when she learned that Lauren* had been bitten, she went over to her sister's house. She checked Lauren's nose and concluded that there was no major damage. She put a band-aid on the nose and then took snapshots, five of which were admitted into evidence. Hatley relied upon the snapshots to show that Lauren was not seriously injured.

Finally, Kelly Simpson, a therapist/counselor with J&L Human Systems with a master's degree in psychology, testified about the "sorry, sir" game:

> She [Lauren] said he would get very angry with her for not telling him that he loved her (sic) in the same way that she would speak to her mother on the phone and say that she loved him (sic).[3] She said that he got physical with her at times, pinching her legs or pinching her arms, or pulling the hairs on her legs and making her say, "yes, sir", "sorry, sir"; that he would go behind the couch and take her arm and twist it and tell her that she was going to behave, basically, that she was going to do certain things, and that she was -- kind of "or else". That's all that's coming to mind right now. There are many things like that that she told me.

Dr. Lammers saw Lauren with bruises, small, circular bruises on her arms, that looked like they had been made by fingertips. Lauren told him that she had been on the phone with her mother while she was visiting with Hatley and she had told her mother that she loved her. Hatley held her by the arms and asked her why she never called him to tell him that she loved him. Dr. Lammers noticed bruises on a second occasion. Dr. Cox met with appellee, Hatley, and

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[3] The (sic)s were inserted by the court reporter.

Lauren in his office in early January 1996. There were allegations that Lauren had been bruised, and she attributed the bruises to Hatley. She did in fact have some nondescript bruises. When Lauren "kind of demonstrated on [Dr. Cox] how she felt that she had gotten the bruises." Hatley began to quiz her. Hatley was quizzing Lauren "kind of lawyerlike. It was kind of a cross-examination. I'd say he was aggressive in tone." Dr. Cox put a stop to the conversation, which was making Lauren more anxious. Hatley acknowledged that there was some playful physical interaction between the two of them, but he certainly did not mean to harm her in any way. Dr. Cox did not think that Hatley really acknowledged bruising her.

Finally, appellee and McCarter moved to Waco in March 1995. In August 1996, Lauren entered the second grade, taught by Karen Copeland. Lauren was worried that she would be taken away from her mother. Lauren once reported to Copeland that two men, spies hired by Hatley, watched her as she ate her lunch. One day when her father came to pick her up, Lauren was too afraid to go meet him.

Robert Seaton, who does investigative work as an off-duty trooper with the Texas Department of Public Safety, testified as a witness on Hatley's behalf. He conceded that he was one of the men, at least on one occasion, who followed Lauren around one day and to whom Copeland was referring.

The burden of proof required to terminate a parent's rights is clear and convincing evidence. *See* TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 1998). "Clear and convincing evidence" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belie or conviction as to the truth of the allegations sought to be established. TEX. FAM. CODE ANN. § 101.007 (Vernon

1996). Even with this standard, however, and considering only the evidence and inferences, viewed in their most favorable light, that support the jury's finding, and disregarding all evidence and inferences to the contrary, we conclude that the evidence is legally sufficient to show that Hatley engaged in conduct that endangered the physical or emotional well-being of the child. He pressed the charges of sexual abuse against appellee and her mother to anyone who would listen. At one time he accused appellee's father and husband of committing sexual abuse. He confided in a friend that asserting the charges of sexual abuse might get him greater custodial rights. He had three pelvic examinations performed on Lauren, the first when she was still an infant and the third after Judge Lewis had expressly admonished him not to have another such examination done. To do the examinations, he selected two doctors with whom he had extended relationships, one who treated him for sports injuries and another who consulted with him on personal injury cases. Neither doctor was a pediatrician or gynecologist. Even so, neither doctor supported his claim of sexual abuse. There was evidence that he did not provide Lauren with medical attention when it was required. There was also evidence that Lauren developed a great anxiety that Hatley would keep her away from her mother. There was evidence that Hatley pinched her or held her tightly enough to cause bruises, and that he did so at least once because he overheard Lauren tell her mother over the phone that she loved her. Lauren knew that photographs taken of her when she was visiting with Hatley might be used in court against her mother. Lauren also knew that Hatley had hired private investigators to follow her around in her daily routine, on at least one occasion. We conclude that the evidence was legally sufficient, under a clear and convincing standard, to support the jury's verdict.

We now address Hatley's factual insufficiency argument. To do so we must consider and weigh all the evidence equally. Debbie, Hatley's girlfriend after the divorce and now his wife, testified that, once when Hatley was watching football, Lauren went up behind him and knocked his hat off. She jumped over him and he started tickling her. He took her wrist and funny bone and she said, "Sorry. sir." It became a game between the two of them, and no more.

Clemens, the attorney ad litem, felt that there was sexual abuse in the past, but she was not concerned because it was no longer ongoing. When appellee spoke to Clemens about the bruises that Lauren had received. Clemens replied that Lauren had a good imagination. She felt that Lauren would benefit from Hatley's having more power, not from having his parental rights terminated. Appellee took some photographs of Lauren in an attempt to show the bruises. She submitted the photographs to Dr. Lammers, who called Child Protective Services. That agency did not make a report on the incident.

Some time before October 1994 (when the Houston hearing on her petition for writ of habeas corpus occurred), appellee related to her mother that she was afraid that her mother had abused the child while giving her a bath.

Hatley called Dr. Luis Vernon Fabre to the stand. Fabre is a psychiatrist. He thinks generally that custody litigation is time-consuming, expensive, and "terrible for the children." He evaluated appellee and diagnosed her with borderline personality disorder; she had a pattern of unstable and intense interpersonal relationships. He did not, however, meet with appellee personally; he made his evaluation of the basis of written records by others. He advised Hatley to seek custody. He could not state for a fact that Lauren

suffered any sexual abuse, but it was not unreasonable for Hatley to believe his daughter. Later on in his testimony, he said that the sexual allegations probably were true.

Bill Hatley, Hatley's father, testified that when he and his son were watching television over the Thanksgiving holiday in 1994, Lauren came downstairs and said she was hurting in her private parts. Lauren requested her father to take her to the doctor. She was crying and in pain. He accompanied Lauren to Dr. Chana's but waited outside while Lauren was examined, for a period of about fifteen minutes. Sexual abuse was never discussed.

Seaton, the private investigator hired by Hatley, followed Hatley and Lauren during a weekend visitation in March 1996. He observed Hatley, Lauren, and Debbie go to dinner for about forty-five minutes; then they went to a Wal-Mart store and a movie. Finally, Hatley's parents joined them, and they all went to a school playground. Seaton observed nothing unusual. The entire time he observed them was between four-and-a-half and five hours. Although Seaton dressed in plain clothes during this time, Hatley knew, of course, that Seaton was trailing him. Furthermore, the activities in which Hatley and his family engaged, as Seaton observed them, were highly structured activities allowing for minimal personal interaction.

There is some evidence that Lauren might have been subject to some abuse, not necessarily sexual in nature. There is some evidence that she might have been rubbed in the vagina somewhat too roughly. Yet the only two witnesses who believed that Lauren might have suffered sexual abuse were Clemens, the attorney ad litem, and Dr. Fabre. Clemens stated that she was no longer concerned about the sexual abuse allegations because any such abuse was over and would not recur. Dr. Fabre was somewhat

equivocal in his testimony and based it entirely on information that Hatley had given him. Dr. Lammers was sufficiently concerned with the bruises he saw on Lauren's body that he referred the matter to Child Protective Services, although it did not pursue the matter itself. Even so, we cannot say that the jury's verdict was so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, even under the clear and convincing evidence standard.

In his reply brief, Hatley takes a new tack from the arguments made in his original brief. He argues that none of the expert witnesses should have been allowed to testify at all, because psychological testimony is "pure subjective speculation." But he did not object to the testimony and has, therefore, waived any error. *See* TEX. R. APP. P. 33.1(a). Furthermore, he himself proffered the testimony of Dr. Fabre, his own expert. Despite his argument that "[i]t is simply beyond the capability of any psychologist or psychiatrist to make any scientifically reliable prediction." Dr. Fabre was the most explicit, of all the experts, in predicting what the future might bring:

> Q. When you read these reports and saw these diagnoses of that child, did that surprise you based on what you told Mr. Hatley earlier?
>
> A No, this is exactly what I predicted.
>
> Q Do you think this child is the kind of child that needs some sort of help by change of any type of condition in her home life?
>
> A Yes.
>
> Q Why is that?

> A Well, because if things continue the way they are the rest of my predictions are going to come true. She's going to have more serious problems as she grows up.

Thus, not only did Hatley fail to object to appellee's expert witnesses; he proffered one of his own, who is subject to the very criticism he lodges against appellee's experts. A party on appeal should not be heard to complain of the admission of improper evidence offered by the other side, when he, himself, introduced the same evidence or evidence of a similar character. *Southwestern Elec. Power Co. v. Burlington Northern R.R. Co.*, 966 S.W.2d 467, 473 (Tex. 1998).

Hatley attempts to argue that his trial counsel's failure to object rendered counsel's assistance ineffective. Ineffective assistance of counsel, however, is a concept unknown to termination cases. *See Krasniqi v. Dallas Co. Child Protective Servs.*, 809 S.W.2d 927, 931-32 (Tex. App.--Dallas 1991, writ denied), *cert. denied*, 503 U.S. 1006 & 504 U.S. 940 (1992). We conclude that Hatley's attack on the sufficiency of the expert witnesses in this case must fail.

Finally, Hatley argues that the trial court itself failed to review the sufficiency of the evidence to terminate. *See* TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 1998). Judge Bill Burdock presided over the jury trial. He resigned after trial without signing a judgment. Judge Joe L. Spurlock signed a judgment without reviewing the record of the trial in this case. Therefore, Hatley reasons, Judge Spurlock could not review the record for the sufficiency of the evidence as required by the Texas Family Code.

This argument is without merit. On January 3, 1997, Judge Burdock conducted a hearing on Hatley's motion for new trial, which he denied.[4] It is true that Judge Spurlock signed the final judgment. It is also true that Judge Spurlock did not have the entire reporter's record reduced to written form when he signed the final judgment. Nonetheless, he did have the benefit of Judge Burdock's thinking, as reflected in the docket entry notes. Judge Burdock reviewed the evidence and Hatley does not argue otherwise. Hatley's motion for new trial expressly contended that the evidence was factually insufficient to support the jury findings; when Judge Burdock denied the motion, he necessarily made the judicial decision that the evidence was sufficient. We know of no authority that requires a judge new to a case to review the entire record when another, predecessor judge has already ruled upon the sufficiency of the evidence. Judge Spurlock was doing nothing more than the ministerial act of reducing the trial court's judgment to written form. *See Henry v. Cullum Companies, Inc.* 891 S.W.2d 789, 792-93 (Tex. App.--Amarillo 1995, writ denied); *Oak Creek Homes, Inc., v. Jones*, 758 S.W.2d 288, 290 (Tex. App.--Waco 1988, no writ). In short, Hatley had one judge review the sufficiency of the evidence; he was not entitled, because of a fortuitous set of circumstances, to have two judges do so.

The reason Judge Spurlock did not have the entire reporter's record before him was that Hatley did not make

---

[4] We do not have the record from that hearing. We do, however, have a docket entry; "1-3-97 MNT heard parties present. MNT denied BR." Appellee tells us that Judge Burdock denied the motion for new trial on January 3, 1997. The docket entry appears to support her assertion. Hatley's argument thus boils down to the position that, although Judge Burdock clearly considered all the evidence in the case in deciding to uphold the jury's verdict. Hatley was entitled to have Judge Spurlock review the entire record anew, merely because he happened to be the judge who signed the final judgment.

the entire record available to Judge Spurlock. Hatley contends that, because a termination case is a quasi criminal proceeding, he did not have the responsibility for preparing the record. He cites *M.L.B. V. S.L.J.*, 519 u.s. 102 (1996). M.L.B. however, stands for no more than the proposition that the State must bear the costs for preparing an adequate record, in a termination case, for an indigent appellant. Yet even in a criminal case one seeking review must provide a record to the reviewing court is he is able to do so. Hatley makes no argument, and made none before the trial court, that he was indigent; to the contrary, he testified that he had spent around $200,000 in fees and litigation costs. We resolve Hatley's second issue against him.

Hatley's third issue is that the trial court erred in not transferring the case to McLennan County. The Houston court, in which appellee had originally filed the divorce action, transferred the case to the Dallas district court where the case went to trial. In the meantime, appellee and Lauren had moved to Waco to join her husband, Jack McCarter. Trial began on November 18, 1996; the jury verdict was returned December 5, 1996; and Hatley filed his motion to transfer venue, on the ground that Lauren was now living in Waco, on February 14, 1997. There is no question that Hatley's motion was untimely. *See* TEX. FAM. CODE ANN. § 155.204(a) (Vernon 1996);*Bollard v. Berchelmann*, 921 S.W.2d 861, 864-65 (Tex. App.--San Antonio 1996, orig. proceeding). He has therefore waived any complaint. We resolve Hatley's third issue against him.

Hatley's fourth issue is that the trial court erred in improperly instructing the jury on the law and in making an impermissible comment on the weight of the evidence. In the portion of the jury charge containing definitions and instructions, the charge begins with the simple statement that "[t]his is a case for termination of parental rights." When

Judge Burdock read the charge to the jury, he misquoted the sentence: "This is a case of terminating parental rights." Hatley argues that both comments are impermissible comments on the weight of the evidence and an improper instruction on the law. We disagree.

An impermissible comment on the weight of the evidence occurs when it is determined that the judge assumed the truth of a material controverted fact or exaggerated, minimized, or withdrew some pertinent evidence from the jury consideration. An instruction also will be held to be an improper comment on the weight of the evidence if it suggests to the jury the trail judge's opinion concerning the matter about which the jury is asked. *Redwine v. AAA Life Insurance Company*, 852 S.W.2d 10, 14 (Tex. App.--Dallas 1993, no writ). A statement on the nature of the case is hardly a comment on the evidence. It is uncontroverted that the case was a termination case. The statement either by itself, or as read by Judge Burdock, does not exaggerate, minimize, or withdraw any pertinent evidence. The statement does not suggest to the jury the trial judge's opinion concerning the matter about which the jury is asked. We resolve Hatley's fourth issue against him.

Hatley's fifth issue is that the trial court erred in failing to grant a new trial resulting from incurable jury argument. His sixth issue is that appellee continually referred to improper matters, throughout the trial, thus depriving Hatley of a fair trial. He addresses these two issues together; we will do likewise.

Hatley argues that in their motions in limine the parties presented twenty-six topics that were not to be discussed. Although Hatley lists all twenty-sic topics, he gives record references for only three of them (two of which reference the same few lines in the record). An appellate

court has no duty to search a voluminous record without guidance from the appellant to determine whether an assertion of reversible error is valid. *Anheuser-Busch Companies, Inc., v. Summit Coffee Company*, 858 S.W.2d 928, 942 (Tex. App.--Dallas 1993, writ denied),*cert. granted, jr. vacated*, 514 U.S. 1001 (1995), *op. withdrawn in part on remand*, 934 S.W.2d 705 (Tex. App.--Dallas 1996, writ dism'd by agr.); *Most Worshipful Prince Hall Grand Lodge v. Jackson*, 732 S.W.2d 407, 412 (Tex. App.--Dallas 1987, writ ref'd n.r.e.) We therefore confine our analysis to the three topics for which Hatley provides record references.

Fist, Hatley had sued appellee, her mother Dorothy Dickerson, and appellee's counsel, in tort, for alienation of Lauren's affections. Appellee's counsel referred to that litigation once during opening argument and once during closing argument. When Dorothy was on the stand, she testified that she was served with the suit a few days after her husband Hank had died but before his funeral. Hatley objected.

Earlier on, however, Hatley himself testified that appellee had bouts of anorexia, bulimia, and alcoholism when she was younger, before she married him. The trial judge took a short recess, out of the presence of the jury, and admonished everyone:

> Folks, do these [m]otions in [l]imine mean anything to anybody? We got out on opening argument and we skimmed the surface of one or two right off the bat. And Mr. Hatley just testifies to everything that we were trying to limit the case to. And, of course, you opened a lot of this up. Counsel, when you started talking about before the time of the divorce.

> And I want you-all to understand that I aim to try the case and the jury's only going to be submitted issues involving the conservatorship of this child. But I just don't believe it's appropriate just to flagrantly violate any and all pretrial rulings in limine. And, Mr. Hatley, you just proceeded to--I mean, at least Mrs. McKnight was --you could argue maybe a little bit about hers; but I mean, you, sir, just let it all hang out. And I'm kind of--It's a wide open question; I understand that. But surely folks, I'm asking you to be somewhat cognizant of the pretrial rulings the Court made. And if you're going to get into that area, narrow the scope of your questions a little bit. And if you're going to get into that area please approach the bench.

Later, when appellee mentions the tort litigation and Hatley objects, the trial judge responds:

> Well, and I will grant you a running objection to this testimony. I realize there was a [m]otion in [l]imine on this point; but the way the trial has progressed to this point, the Court will see fit to reverse itself and we'll proceed with this testimony. The running objection will be granted. Let's proceed.

In short, the trial judge permitted appellee to explore Dorothy's testimony about Hatley's tort suit because Hatley himself had tried to circumvent the court's rulings in limine. There were nine days of testimony. Hatley does not show how one reference to his tort litigation in the middle of those nine days could have so inflamed the jury that it rendered an improper verdict. We cannot say that the trial judge committed reversible error.

During closing argument, appellee alluded to Hatley's income tax returns and to a deduction that Hatley took for his tort litigation. Hatley asserts that his motion in limine should have prevented appellee from referring either to his income tax returns generally or specifically to any tax deductions taken as a result of his tort litigation. As we have already discussed, however, by this time the trial court had admonished both parties for their failure to respect the rulings in limine. Moreover, Hatley did not object at trial and therefore has failed to preserve error. *See* TEX. R. APP. P. 33.1(a).

Finally, Hatley complains that appellee made incurable jury argument. He had presented a videotape showing what the "sorry, sir" game was like, and appellee attacked the videotape as a fake reconstruction. Appellee also made personal attacks against Hatley, for example, called him a "hate driven man." Five times appellee referred to Debbie as "helpful"; this epithet comes from the testimony of Dr. Fabre, Hatley's own witness, who explained that Debbie became involved in the sexual abuse allegations because "Debbie Hatley is one of these overly helpful people." In short, the jury argument was more or less what one could expect at the culmination of an acrimonious custody battle. Yet Hatley does not show how it was incurable or how it constituted reversible error.

Most importantly, Hatley did not make a single objection to any portion of the closing jury argument. The supreme court has been very clear about the burden of a complainant arguing improper jury argument:

> [T]he complainant must prove a number of things. He has the burden to prove (1) *an error* (2) that was not invited or provoked, (3) *that was preserved by the proper trial predicate, such as an objection, a motion*

> *to instruct, or a motion for mistrial*, and (4) was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge....There are only rare instances of incurable harm from improper argument. The complainant has the further burden to prove (5) that the argument by its nature, degree and extent constituted reversibly harmful error. How long the argument continued, whether it was repeated or abandoned and whether there was cumulative error are proper inquiries. All of the evidence must be closely examined to determine (6) the argument's probably effect on a material finding. (7)Importantly, a reversal must come from an evaluation of the whole case, which begins with the voir dire argument and ends with the closing argument. The record may show that the cause is weak,strong, or very close. From all of these factors, the complainant must show that the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence....

Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839-40 (Tex. 1979), (emphasis added). Hatley failed to preserve error. He certainly has not shown that the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence. Hatley cites one isolated case for the proposition that an objection need not be made to incurable argument to complain of it on appeal. *See MAPCO, Inc., v. Jenkins*, 476 S.W.2d 55, 61-62 (Tex. Civ. App.--Amarillo 1971, writ ref'd n.r.e.). In light of the clear imperative in *Reese* and later supreme court authority that one must preserve error when improper jury argument is made, we decline to follow *MAPCO*. We resolve Hatley's fifth and sixth issues against him.

We affirm the trial court's judgment.

/s/ Sue Lagarde
SUE LAGARDE
JUSTICE

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Tex. R. App. P. 47
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APPENDIX E

CAUSE NO. 94-18870-Y

IN THE INTEREST OF	§	**IN THE DISTRICT**
	§	**COURT**
LAUREN ELIZABETH	§	**O F D A L L A S**
COUNTY,		
HATLEY	§	**TEXAS**
	§	
A MINOR CHILD	§	**330TH JUDICIAL**
	§	**DISTRICT**

DECREE OF TERMINATION OF PARENT-CHILD RELATIONSHIP

On the 18 day of November, 1996, the above-entitled and numbered cause came on for consideration and trial.

Appearances

Petitioner, **JANET DICKERSON MCCARTER**, appeared in person and by her attorneys of record and announced ready for trial.

Respondent, **LARRY HATLEY**, appeared in person and by his attorneys of record and announced ready for trial.

Also appearing was **LEE CLEMENS**, appointed by the Court as the attorney/guardian ad litem of the subject child, **LAUREN ELIZABETH HATLEY**, who is a minor.

Jurisdiction and Domicile

The Court, having examined the pleadings and heard the evidence and arguments of counsel, finds that all pleadings are in due order and contain all the allegations, information, and prerequisites required by law, finds that it had jurisdiction of this cause and of all the parties and that no other court has continuing, exclusive jurisdiction of this cause. All persons entitled to citation were properly cited.

DECREE OF TERMINATION OF PARENT-CHILD RELATIONSHIP

Record

The record of testimony was duly reported by Yolanda Melendez.

Jury

A jury was selected, all questions of fact were submitted to the jury, and a verdict was returned and duly filed.

Child

The following child is the subject of this suit:

NAME:	**LAUREN ELIZABETH HATLEY**
SEX:	**FEMALE**
BIRTHPLACE:	**HOUSTON, TEXAS**
BIRTH DATE:	**MAY 29, 1988**
PRESENT ADDRESS:	**9004 WILLOW BEND DRIVE WACO, TEXAS 76712**

HOME STATE: **TEXAS**
SOC.SEC. #: **644-03-1981**
DRIVER'S LICENSE #: **N/A**

Termination of Parent-Child Relationship

The Court finds by clear and convincing evidence that **LARRY HATLEY** has:

(1) knowingly placed or knowingly allowed the child to remain in conditions or surroundings that endanger the physical or emotional well-being of the child; or,

(2) engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child.

The Court also finds by clear and convincing evidence that termination of the parent-child relationship between **LARRY HATLEY** and **LAUREN ELIZABETH HATLEY** is in the best interest of the child.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the parent-child relationship between **LARRY HATLEY** and the child **LAUREN ELIZABETH HATLEY**, the subject of this suit is terminated.

Managing Conservator

IT IS ORDERED, ADJUDGED AND DECREED that **JANET DICKERSON MCCARTER** is appointed Managing Conservator of the child the subject of the suit, the

Court finding this appointment to be in the best interest of the child.

Record Sealed

IT IS ORDERED, ADJUDGED, AND DECREED that all records in this case, including the minutes, be sealed. However, the parties' attorneys may have access to the records and minutes for the purpose of appeal.

Date of Judgment

This Decree of Termination of Parent-Child Relationship judicially **PRONOUNCED AND RENDERED** in the 330th Judicial District Court, Dallas County, Dallas, 600 Commerce, Texas, on the 6 day of December, 1996, and further noted in the court's docket sheet on the same date, but signed on this the 5 day of August, 1997.

JOE SPURLOCK II
SENIOR JUDGE, RETIRED
2D COURT OF APPEALS
SITTING FOR 330 COURT

_____

JUDGE PRESIDING

DECREE OF TERMINATION OF PARENT-CHILD RELATIONSHIP

APPENDIX F

CONSTITUTION OF THE UNITED STATES AMENDMENT VI--JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

CONSTITUTION OF THE UNITED STATES

Amendment I. Freedom of Religion, Speech and Prss; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedon of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF UNITED STATES

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. Jury trials for crimes, and procedural rights In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State

and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

CONSTITUTION OF THE UNITED STATES

Amendment IX. Construction of Enumerated Rights

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debtsd incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or

BEST AVAILABL

emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED FAMILY CODE
TITLE 5. THE PARENT-CHILD RELATIONSHIP AND THE SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP
SUBTITLE B. SUITS AFFECTING THE PARENT-CHILD RELATIONSHIP
CHAPTER 161. TERMINATION OF THE PARENT-CHILD RELATIONSHIP
SUBCHAPTER C. HEARING AND ORDER

§ 161.206. Order Terminating Parental Rights

(a) If the court finds by clear and convincing evidence grounds for termination of the parent-child relationship, it shall render an order terminating the parent-child relationship.

(b) An order terminating the parent-child relationship divests the parent and the child of all legal rights and duties with respect to each other, except that the child retains the right to inherit from and through the parent unless the court otherwise provides.

(c) Nothing in this chapter precludes or affects the rights of a biological or adoptive maternal or paternal grandparent to reasonable access under Chapter 153.

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VERNON'S TEXAS STATUTES AND CODES
ANNOTATED FAMILY CODE
TITLE 5. THE PARENT-CHILD RELATIONSHIP
AND THE SUIT AFFECTING THE
PARENT-CHILD RELATIONSHIP
SUBTITLE B. SUITS AFFECTING THE
PARENT-CHILD RELATIONSHIP
CHAPTER 161. TERMINATION OF THE
PARENT-CHILD RELATIONSHIP
SUBCHAPTER A. GROUNDS

s 161.001. Involuntary Termination of Parent-Child Relationship

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence:

(1) that the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return;

(B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return without providing for adequate support of the child, and remained away for a period of at least three months;

(C) voluntarily left the child alone or the possession of another without providing adequate support of the child and remained away for a period of at least six months;

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child;

(F) failed to support the child in accordance with the parent's ability during a period of one year ending within six

months of the date of the filing of the petition;

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence;

(H) voluntarily, and with knowledge of the pregancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth;

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Chapter 264;

(J) been the major cause of;

(i) the failure of the child to be enrolled in school as required by the Education Code; or

(ii) the child's absence from the child's home without the consent of the parents or guardian for a substantial length of time or without the intent to return;

(K) executed before or after the suit if filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;

(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code or adjudicated under Title 3 for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following Penal Code sections:

(i) Section 19.02 (murder);
(ii) Section 19.03 (capital murder);
(iii) Section 21.11 (indecency with a child);
(iv) Section 22.01 (assault);
(v) Section 22.011 (sexual assault);

(vi) Section 22.02 (aggravated assault);

(vii) Section 22.021 (aggravated sexual assault);

(viii) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(ix) Section 22.041 (abondoning or endangering child);

(x) Section 25.02 (prohibited sexual conduct);

(xi) Section 43.25 (sexual performance by a child; and

(xii) Section 43.26 (possession or promotion of child pornography0:

(M) had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;

(N) constructively abandoned the child who has been in the permanent of temporary managing conservatorship of the Department of Protective and Regulatory Services or an authorized agency for not less than six months; and:

(i) the department or authorized agency has made reasonable efforts to return the child to the parent;

(ii) the parent has not regularly visited of maintained significant contact with the child; and

(iii) the parent has demonstrated an inability to provide the child with a safe environment;

(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who hcas been in the permanent of temporary managing conservatorship of the Department of Protective and Regulatory Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child;

(P) used a controlled substance, as defined by Chapter 481, Health and Safety Code;

(i) in a manner that endangered the health or safety of

the child, and failed to complete a court-ordered substance abuse treatment program; or

(ii) repeatedly, after completion of a court-ordered substance treatment program, in a manner that endangered the health of safety of the child;

(Q) knowingly engaged in criminal conduct that results in the parent's imprisonment and inability to care for the child for not less than two years from the date of filing the petition; or

(R) been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription, as defined by Section 261.001(7); and

(2) that termination is in the best interest of the child.

CREDIT

Supreme Court, U.S.
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No. 99-933

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY DALE HATLEY,
Petitioner,

v.

JANET DICKERSON McCARTER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

32 pp

CORPORATE DISCLOSURE

Respondent, Janet Dickerson McCarter has no corporate affiliations.

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Other

Texas Family Code § 161.001(1) (D), (E) and (2) . . 4,5,6

SUMMARY OF ARGUMENT

Petitioner argues that his parental rights were terminated because he exercised his First Amendment rights to report child abuse, that they were terminated based upon an incorrect legal standard, the trial court failed to review the evidence before it signed a the decree terminating his parental rights, the burden of proof was somehow incorrectly shifted to Petitioner, and Petitioner was denied effective assistance of counsel to which he was constitutionally entitled to. As is seen, Petitioner's parental rights were terminated for many reasons, all of which met the clear and convincing standard required by this Honorable Court, the evidence was reviewed prior to the entry of the decree terminating his rights and he was neither entitled to nor denied effective assistance of counsel.

This Honorable Court grants petitions for certiorari only for compelling reasons, such as when there is a conflict of authority between the Courts of Appeal or state courts of last resort, a departure from the usual course of judicial proceedings or there is an important unresolved question of federal law which should be decided by this Honorable Court. None of those issues are present herein.

QUESTION 1

PETITIONER'S PARENTAL RIGHTS WERE NOT TERMINATED FOR CONDUCT PROTECTED BY THE FIRST AMENDMENT

Petitioner's first point misstates both the facts and the law. Petitioner contends that his parental rights were terminated because he made allegations that his daughter was the victim of sexual abuse, this was an exercise of protected

First Amendment rights and, thus, could not constitute the clear and convincing evidence sufficient to form a basis for termination of Petitioner's parental rights.

Petitioner cites *Andrews v. Ballard*, 498 F.Supp.1038 (D. Tex. 1980) as support for his contention that his comments regarding suspected child abuse and having the child examined by physicians was an exercise of protected First Amendment rights. However, *Andrews v. Ballard* held only that the constitutional right of privacy included a patient's right to obtain acupuncture treatment.

Although no one would seriously argue that reporting suspected child abuse is, in and of itself, a protected right, it is equally well settled law, as set forth in *California Transport* v. *Trucking Unlimited*, 404 U.S. 508, 94 S.Ct. 609 (1974), the very case cited by Petitioner, that First Amendment rights are not free from regulation when they are used as part of conduct violative of another valid statute. In *California Transport* v. *Trucking Unlimited*, *supra*, this Honorable Court held that a carrier's institution of suits before administrative agencies and courts, though normally protected by the First Amendment, was not protected when used as part of conduct violative of the antitrust laws.

Although, under the principle set forth in *California Transport* v. *Trucking Unlimited*, *supra*, Petitioner's parental rights could be legally terminated for persistent allegations that his daughter was the victim of sexual abuse, this Honorable Court does not need to reach this question because that is not what occurred in the courts below.

The best description of the facts which formed the basis for termination of Petitioner's parental rights is found in the opinion of the Court of Appeals for the Fifth District of Texas

at Dallas, excerpted by Petitioner at page 4-5 of his Petition For Writ of Certiorari. In addition to the two sentences bolded by Petitioner, reading **"He pressed the charges of sexual abuse against appellee and her mother to anyone who would listen. At one time he accused appellee's father and husband of committing sexual abuse"**, there was significantly more clear and convincing evidence to support the conclusion that Petitioner "engaged in conduct that endangered the physical or emotional well-being of the child, i.e. unfitness.

In the portion of the opinion excerpted by Petitioner, the Court of Appeals For the Fifth District of Texas at Dallas set out the additional conduct of Petitioner that endangered the physical or emotional well-being of his daughter:

> [1] He confided in a friend that asserting the charges of sexual abuse might get him greater custodial rights. [2] He had three pelvic examinations performed on Lauren, [3] the first when she was still an infant and the [4] third after Judge Lewis had expressly admonished him not to have another such examination done. [5] To do the examinations, he selected two doctors with whom he had extended relationships ... . [6] Neither doctor was a pediatrician or gynecologist. [7] Even so, neither doctor supported his claim of sexual abuse. [8] There was also evidence that he did not provide Lauren with medical attention when it was required. [9] There was also evidence that Lauren developed a great anxiety that Hatley would keep her away from her mother. [10] There was evidence that Hatley pinched her or held her tightly enough to cause bruises, and that [11] he did so at least once

because he overheard Lauren tell her mother over the phone that she loved her. [12] Lauren knew that photographs taken of her when she was visiting with Hatley might be used in court against her mother. [13] Lauren also knew that Hatley had hired private investigators to follow her around in her daily routine, on at least one occasion.[1]

QUESTION 2

PETITIONER'S PARENTAL RIGHTS WERE TERMINATED PURSUANT TO CLEAR AND CONVINCING EVIDENCE, THE CORRECT CONSTITUTIONAL STANDARD

Respondent herein sought termination of Petitioner's parental rights under Sections 161.001(1) (D), (E) and (2) of the Texas Family Code.[2]

Section 161.001 of the Texas Family Code provides, *in relevant part*, that a court may order the termination of the parent-child relationship if the court finds by clear and convincing evidence:

> (1) that the parent has:
>
> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings that

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[1] Opinion of the Court of Appeals, Fifth District of Texas at Dallas; Petitioner's Appendix D, P. 23a, *numbers and emphasis added.*

[2] Petitioner's Appendix F, P. 44a.

endanger the physical or emotional well-being of the child; or,

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct that endangers the physical or emotional well-being of the child; and,

(2) that termination is in the best interest of the child.

The Texas Pattern Jury Charge, 218.1B[3] tracks Section 161.001 of the Texas Family Code, requiring the statutory findings be proved by clear and convincing evidence. Pursuant to the pattern jury charge and the statute, the trial jury herein was given the following question:

Question No. 1:

For the parent-child relationship between **LARRY HATLEY** and the child, **LAUREN ELIZABETH HATLEY**, to be terminated in this case, it must proved by clear and convincing evidence that **LARRY HATLEY** –

1. knowingly placed or knowingly allowed **LAUREN ELIZABETH HATLEY** to remain in conditions or surroundings which endanger the physical or emotional well-being of **LAUREN ELIZABETH HATLEY**; or

[3] Respondent's Appendix A.

2. engaged in conduct or knowingly placed **LAUREN ELIZABETH HATLEY** with persons who engaged in conduct which endangers the physical or emotional well-being of **LAUREN ELIZABETH HATLEY**, AND,

For the parent-child relationship to be terminated in this case, it must be proved by clear and convincing evidence that termination of the parent-child relationship would be in the best interest of the child.

QUESTION NO. 1:

Should the parent-child relationship between **LARRY HATLEY and LAUREN ELIZABETH HATLEY** be terminated?

Answer "Yes" or "No."

ANSWER:_____

The Jury answered Question No. 1 "Yes"[4] and the trial entered a "Decree of Termination of Parent-Child Relationship."[5] In that Decree, the trial court found, by clear and convincing evidence, that Petitioner had engaged in conduct violative of Section 161.001(1)(D), (E) and (2) of the Texas Family Code, *supra*.

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[4] Respondent's Appendix B.

[5] Petitioner's Appendix E.

Petitioner contends the Judgment terminating his parental rights is in contravention of this Honorable Court's opinion in by *Santosky v. Kramer*, 455 U.S. 745 (1992). Petitioner argues that *Santosky* somehow prohibits submission of cases regarding termination of parental rights via global jury questions.[6] Petitioner's contention is, simply put, wrong. In *Santosky*, this Honorable Court held, pursuant to the Due Process Clause of the Fourteenth Amendment, that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."[7] The Texas Family Code and the jury instructions, charge and verdict at issue herein all meet that standard.

The entire focus of *Santosky* was on the burden, by clear and convincing evidence, which must be met before one's parental rights may be terminated. What Petitioner does is, without citation, take this Honorable Court's remarks in Footnote 10 of *Santosky, supra,* and attempts to bootstrap them into a conclusion that a global jury charge somehow violates the Due Process requirements regarding termination of parental rights. In Footnote 10, this Honorable Court, in addressing the trial court's refusal to terminate the Petitioner's parental rights on a non-statutory, no-fault basis, noted that such action, "without some showing of unfitness" would probably violate the Due Process Clause. That did not occur in the instant case.

Petitioner seems to argue that to pass Constitutional muster, a decree terminating parental rights must contain the word "unfitness". This is pure legerdemain based upon *dicta*

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[6] Petitioner fails to note that global jury submissions have been a component of federal practice for years.

[7] *Santosky* at 747-748.

in a footnote. Herein, as discussed in that footnote, the jury was instructed that it could find that Petitioner's parental rights could be terminated only if it were proved, by clear and convincing evidence, that Petitioner engaged in conduct which equaled "unfitness" and upon finding by clear and convincing evidence that termination of the parent-child relationship would be in the best interest of the child. The standard applied herein, pursuant to the Texas Family Code and Texas Pattern Jury Charge, exceeded that required by *Santosky, supra*, and constitutes no valid or legal basis for granting Petitioner's Writ.

QUESTION 3

PETITIONER WAS NOT DENIED A FACTUAL REVIEW OF THE RECORD BY THE COURT

Petitioner contends termination of parental rights is a "quasi-criminal" matter and, thus, the burden must remain with the state (or Respondent, standing in stead of the State), citing *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Petitioner then argues that because the Judge who actually signed the judgment herein was not the same judge who presided at the trial his due process rights have been violated. Petitioner's argument regarding this point is factually and legally incorrect. First, this Honorable Court in *M.L.B. v. S.L.J.*, *supra*, held that the State, in termination of parental rights cases, could not condition the right to appeal (and, by implication, at the trial level also) upon the ability to pay transcript and filing costs. The only discussion therein regarding the burden of proof related to this Honorable Court's statement that only a transcript could reveal the sufficiency or insufficiency of the evidence upon which termination of parental rights had been based.

Petitioner then argues that the trial court herein did not "conduct the statutorily mandated review of the sufficiency of the evidence" before Petitioner's parental rights were terminated, thus denying him due process of law. As stated by the Court of Appeals for the Fifth District of Texas at Dallas, this argument is without merit.[8] In fact, Petitioner had two hearings on his Motion for a New Trial, one before the trial judge who presided over the trial, Judge Burdock, on January 3, 1997, and another before a new judge, Judge Spurlock, on October 16, 1997.

As again described by the Court of Appeals for the Fifth District of Texas at Dallas, Petitioner's argument "thus boils down to the position that, although Judge Burdock [the presiding trial judge] clearly considered all the evidence in the case in deciding to uphold the jury's verdict, Hatley was entitled to have Judge Spurlock [who replaced Burdock after his resignation] review the entire record anew, merely because he happened to be the judge who signed the final judgment."[9]

Despite the failure of Petitioner to obtain and file a Statement of Facts during the 11 months between the trial judge's overruling of Petitioner's Motion For New Trial and the signing of the Judgment by Judge Spurlock, Judge Spurlock, on his own initiative, obtained from the court reporter a transcript of all four experts, Dr. Cox, Dr. Lammers, Dr. Altschuler and Ms. Simpson, of which Petitioner had complained. As noted by the Court of Appeals for the Fifth District of Texas at Dallas, Judge Burdock, the trial judge, reviewed the evidence and Judge Spurlock's signing of the final judgment, based on Judge Burdock's

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8 Petitioner's Appendix D, P. 28a

9 *Id. at* 28a, fn4.

docket entries, was performing nothing more than a ministerial act.[10] The Court of Appeals for the Fifth District of Texas at Dallas also noted that Petitioner made no argument of indigency, which might have entitled him to a free record, and thus he wasn't entitled to same.[11]

The root of Petitioner's argument regarding the "shifting of the burden" is that he was somehow impermissibly required to pay for a transcript of the trial proceedings. As finally and most eloquently noted by the Court of Appeals for the Fifth District of Texas at Dallas:

> *M.L.B.* however, stands for no more that the proposition that the State must bear the costs for preparing an adequate record, in a termination case, for an indigent appellant. Yet even in a criminal case one seeking review must provide a record to the reviewing court if he is able to do so. Hatley makes no argument, and made none before the trial court, that he was indigent; to the contrary, he testified that he had spent around $200,000 in fees and litigation costs. We resolve Hatley's second issue against him.[12]

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10 *Id. at 28a*

11 *Id .at* 29a.

12 *Id.*

QUESTION 4

PETITIONER WAS NEITHER DENIED EFFECTIVE ASSISTANCE OF COUNSEL NOR WAS HE ENTITLED TO IT

Petitioner argues that termination of Petitioner's parental rights is the equivalent of the death penalty, thus requiring the effective assistance of counsel. In making this argument, Petitioner contends that *M.L.B., supra*, holds that "parents are entitled to the appointment of counsel in termination cases" and, correspondingly, said counsel be effective. Without respect to the fact that Petitioner was not indigent, *M.L.B.* does not even address the issue of appointment of counsel, let alone hold such. In *dicta* therein, this Honorable Court did note that in *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18 (1981) it held that appointed counsel for "indigent persons" was not routinely required, but that a case by case determination would suffice.[13]

In *Krasniqi v. Dallas Co. Child Protective Servs.*, 809 S.W. 2d 927 (Tex.App.-Dallas 1991, writ denied), *cert. denied*, 503 U.S. 1006 and 504 U.S. 940 (1992) the Court of Appeals for the Fifth District of Texas at Dallas held that the constitutional right to effective assistance of counsel in criminal actions does not extend to a civil proceeding Court involving the termination of parental rights. This Honorable denied certiorari, that was the law in 1990 and it is the law today.

The factual basis for Petitioner's argument that he was denied effective assistance of counsel is also incorrect, if not

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[13] *Lassiter at* 32.

totally disingenuous. Petitioner argues that he was denied effective assistance of counsel because Petitioner's counsel did not understand that recent cases have ruled testimony that has no scientific basis, such as psychological testimony, is incompetent and should not be presented to the jury. This simply is not the law under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) *and E.I. DuPont de Nemours and Co., Inc. v. Robinson,* 923 S.W. 2d 549 (Tex 1995). In *Nenno v. State*, 970 S.W. 2d 549 (Tex.Crim.App.-1998) the Texas Court of Criminal Appeals surveyed the federal circuits and found general agreement among them that under the "flexible" inquiry approved by *Daubert,* "(1) *Daubert's* prescription that trial judges act as 'gatekeepers' in determining the reliability of expert evidence applies to all forms of expert testimony and (2) the four factors listed in *Daubert* do not necessarily apply outside of the hard science context; instead methods of proving reliability will vary depending upon the field of expertise."[14] Petitioner's assertion that the psychological testimony allowed at trial was incompetent under *Daubert, supra,* and should have been excluded on proper objection is, simply, unfounded and incorrect. This is even more apparent when it is considered that Petitioner's argument that he was denied effective assistance of counsel is based on Petitioner's lawyer's failure to object to testimony from Court appointed psychologists and his offering of even more damning testimony of his own expert psychologist. Of course, Petitioner fails to apprise this Honorable Court that he is, himself, a practicing lawyer.

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[14] *Nenno v. State at* 561.

CONCLUSION

The proceedings by which Petitioner's parental rights were terminated afforded Petitioner all Constitutional rights to which he was entitled, applied the appropriate procedures and burdens and were correct in all particulars. Therefore, Respondent respectfully requests that this Honorable Court deny Petitioner's Petition For Writ of Certiorari.

Respectfully submitted,

/s/_____

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APPENDIX A

PJC 218.01 Termination of Parent-Child Relationship

PJC 218.01A Termination of Parent-Child Relationship--Instruction

This is a case for termination of parental rights. "Termination" means that the parent-child relationship between the parent and the child is ended. All legal rights, privileges, duties, and powers with respect to each other are cut off, except that the child retains the right to inherit from and through the parent unless the court provides otherwise. The rights, privileges, duties, and powers a parent has are–

1. the right to have physical possession, to direct the moral and religious training, and to establish the legal domicile of the child:

2. the duty of care, control, protection, and reasonable discipline of the child;

3. the duty to support the child, including providing the child with clothing, food. shelter, medical care, and education;

4. the duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including a power as agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;

5. the right to the services and earnings of the child;

6. the power to consent to marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and surgical treatment;

7. the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

8. the power to receive and give receipt for payments for the support of the child and to hold or disburse any funds for the benefit of the child;

9. the right to inherit from and through the child; and

10. any other right, privilege, duty, or power existing between a parent and child by virtue of law.

If no termination of the parent-child relationship is ordered, the court may modify these rights, privileges, duties, and powers by court order.

"Clear and convincing evidence" is that measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

You will be required to determine whether termination of the parent-child relationship in this case would be in the best interest of the child. Some factors to consider in determining the best interest of the child are--

1. the desires of the child,

2. the emotional and physical needs of the child now and in the future,

3. any emotional and physical danger to the child now and in the future,

4. the parenting ability of the individuals seeking custody,

5. the programs available to assist those individuals to promote the best interest of the child,

6. the plans for the child by those individuals or by the agency seeking custody,

7. the stability of the home or proposed placement,

8. the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one, and

9. any excuse for the acts or omissions of the parent.

PJC 218.01B Termination of Parent-Child Relationship--Question

For the parent-child relationship to be terminated in this case, it must be proved by clear and convincing evidence that *PARENT failed to support CHILD in accordance with*

PARENT's ability during the period between February 1, 1991, and February 15, 1992.

For the parent-child relationship to be terminated in this case, it must also be proved by clear and convincing evidence that termination of the parent-child relationship would be in the best interest of the child.

QUESTION 1

Should the parent-child relationship between *PARENT* and *CHILD* be terminated?

Answer. "Yes" or "No."

Answer: _____

[See PJC 218.04 for discussion of additional questions.]

COMMENT

Source. The definition of "termination" in the first paragraph of the instruction in PJC 218.01A is based on Tex. Fam. Code Ann. § 15,07 (Vernon Supp. 1994). The list of rights, privileges, duties, and powers of a parent in that paragraph is based on Code § 12.04. The definition of "clear and convincing evidence" is based on Code § 11.15(c) (1986). The list of factors to be considered in determining the best interest of the child is based on *Holley v. Adams,* 544 S.W..2d 367, 371-72 (Tex. 1976). The submission in PJC 218.01B is based on Tex. Fam. Code Ann, § 15.02 (Vernon Supp. 1994),

When to use. The foregoing instructions and question are for use if termination of the parent-child relationship is sought under the provisions of Tex. Fam.Code Ann. § 15.02 (Vernon Supp, 1994). The instruction in PJC 218.01A should, be used in all such cases. The instruction and question in PJC 218.01B should be used (1) if there has been no prior order or decree under Code § 15.05(c) denying a petition to terminate the parent-child relationship of the parent or (2) if the evidence of grounds for termination relates only to conduct alleged to have occurred *after* the date the prior order denying termination was entered. If there has been such a prior order and evidence has been admitted relating to conduct alleged to have occurred *before* the date the order was entered, see PJC 218.03.

Rewording for appropriate grounds under Code § 15.02. In PJC 218.01B, the clause *PARENT failed to support CHILD in accordance with PARENT's' ability during the period between February 1, 1991, and February 15, 1992,* based on Tex, Fam. Code Ann. § 15.02(a)(l)(F) (Vernon Supp. 1994), is included only as an example. That clause should be replaced by the appropriate ground or grounds for termination in Code § 15.02. See paragraph entitled "Selecting and wording relevant grounds for termination,"

Form of submission. In *Texas Department of Human Services v. E.B.*, 802 S.W. 2d 647 (Tex, 1990), the supreme court explicitly approved the broad-form question in PJC 218.01B, which asks the "controlling question" of whether parental rights should be terminated. The jury is questioned neither about the specific culpable act or acts that constitute the statutory grounds for termination of parental rights nor about whether termination is in the best interest of the child.

See the discussion of broad-form questions in Introduction (8).

Selecting and wording relevant grounds for termination. Only those grounds for termination that are supported by the pleadings and evidence should be included in the instruction in PJC 218.01B. For example, if the allegations for termination are based on Tex. Fam, Code Ann. § 15.02(a)(1)(E) (Vernon Supp. 1994) - that the parent "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child" - an instruction to the jury may be phrased in the statutory language. *In re S.H.A.*, 728 S.W.2d 73 (Tex. App.- Dallas 1987, no writ). In such a case, however, if a valid objection is raised that there is no evidence that the parent *knowingly placed the child with persons who engaged in a conduct,* for example, then that portion of the instruction should be omitted,

If more than one child. If more than one child is involved, PJC 218.01B should be repeated for each child.

If both parents. If termination of the parental rights of both parents is sought, PJC 218.01B should be repeated for each parent.

Grandparental access possible. Tex, Fam. Code Ann. § 14.03(c) (Vernon Supp. 1994) provides that grandparental access may be ordered even if parental rights are terminated. In an appropriate case, PJC 215.13 amt PJC 216.04 (grandparental access- original suit) should be adapted.

APPENDIX B

CASE NO. 94-18870-Y

IN THE DISTRICT COURT
OF DALLAS COUNTY, TEXAS
339TH JUDICIAL DISTRICT COURT

IN THE INTEREST OF	)
LAUREN ELIZABETH HATLEY	)
A MINOR CHILD	)
	)

JURY CHARGE

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all instructions that have previously been given to you. I shall now give you additional instructions that you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice, or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court; this is, what you have seen and heard in this courtroom, together with the law as given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer another question another way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree on all the answer made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority of any other vote of less than ten jurors. If the verdict and all of the answers in it are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any

answer made by the verdict, those jurors who agree to all findings shall each sign the verdict. These instructions are given to you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct, and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other juror who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in the charge in a sense that varies from the commonly understood meaning, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

PREPONDERANCE OF THE EVIDENCE

The term "Preponderance of the evidence" means the greater weight and degree of the credible evidence.

After you retire the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud, and then you will deliberate upon your answers to the questions asked. It is the duty of the presiding juror to:

1. Preside during your deliberations.

2. See that your deliberations are conducted in an orderly manner and in accordance with the instruction in this charge.

3. Write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge.

4. Vote on the questions.

5. Write your answers to the questions in the spaces provided.

6. Certify your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with the other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

_____

JUDGE PRESIDING

DEFINITIONS AND INSTRUCTIONS

1. Termination of Parent-Child Relationship - Definitions and Instructions.

This is a case for termination of parent rights. "Termination" means that the parent-child relationship between the parent and the child is ended. All legal rights, privileges, duties, and powers with respect to each other are cut off, except that the child retains the right to inherit from and through the parent unless the court provides otherwise.

The rights, duties and powers a parent has are ---

1. the right to have physical possession, to direct the oral and religious training, and to establish the legal domicile of the child.

2. the duty of care, control, protection and reasonable discipline of the child;

3. the duty to support the child, including providing the children with clothing, food, shelter, medical care and education;

4. the duty to manage the estate of the child, except when a guardian of the estate has been appointed, including a power as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;

5. the right to the services and earnings of the child;

6. the power to consent to the marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and surgical treatment;

7. the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

8. the power to receive and give receipt for payments for the support of the child and to hold or disburse any funds for the benefit of the child;

9. the right to inherit from and through the child;

10. the right to make decisions concerning the child's education; and,

11. any other rights, privileges, duties, and power existing between a parent and child by virtue of law.

If no termination of the parent child relationship is ordered, the court may modify these rights and duties by court order.

"Clear and convincing evidence" is the measure or degree of proof that produces a firm belief or conviction that the allegations sought to be established are true.

You will be required to determine whether termination of the parent-child relationship in this case would be in the best interest of the child. Some factors to consider in determining the best interest of the child are--

1. the desire of the child;

2. the emotional and physical needs of the child now and in the future;

3. any emotional and physical danger to the child now and in the future;

4. the parenting ability of the individuals seeking custody;

5. the programs available to assist those individuals to promote the best interests of the child;

6. the plans for the child by those individuals or by the agency seeking custody;

7. the stability of the home or proposed placement;

8. the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one; and

9. any excuse for the acts or omissions of the parent. PJC 218.1A

2. Modification of Conservatorship - Instructions and Definitions.

Texas law has adopted certain terminology that varies from the common usage of the language. In this state, the "primary custodian" of the child is known as the "managing conservator." What is ordinarily called "custody" is known

as "managing conservatorship" under Texas Law.

What is commonly called "visitation" is known as "possession of or access to a child" in Texas. A "noncustodial parent" who is awarded "possessor conservator" is known as the "possessory conservator." PJC 215.1

The best interest of the child shall always be the primary consideration in determining questions of managing conservatorship and possession of and access to the child. PJC 215.2

In determining whether to appoint a party sole or joint managing conservator, you shall consider evidence of the intentional use of abusive physical force by a party against his or her spouse or against any person younger than eighteen years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit. PJC 215.3

A person may not be appointed a joint managing conservator if that person has a history or pattern of past or present child neglect or of physical or sexual abuse directed against a parent, a spouse, or a child. PJC 215.4

"Conservator," when that term is used alone, includes a sole managing conservator, a joint managing conservator, and a possessory conservator.

At all times, each parent appointed a conservator has the following rights, subject to any limitation imposed by court order

* * *

QUESTION NO. 1

For the parent-child relationship between **LARRY HATLEY** and the child, **LAUREN ELIZABETH HATLEY,** to be terminated in this case, it must be proved by clear and convincing evidence that **LARRY HATLEY** --

1. knowingly placed or knowingly allowed **LAUREN ELIZABETH HATLEY** to remain in conditions or surroundings which endanger the physical or emotional well being of **LAUREN ELIZABETH HATLEY**; or

2. engaged in conduct or knowingly placed **LAUREN ELIZABETH HATLEY** with persons who engaged in conduct which endangers the physical or emotional well-being of **LAUREN ELIZABETH HATLEY**, and

For the parent-child relationship to be terminated in this case, it must also be proved by clear and convincing evidence that termination of the parent-child relationship would be in the best interest of the child.

QUESTION NO. 1:

Should the parent-child relationship between **LARRY HATLEY** and **LAUREN ELIZABETH HATLEY** be terminated?

Answer "Yes" or "No."

ANSWER: _____